IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3824 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.THAKER

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MAHIDA CHHATRASING GULABSING - Petitioner(s)
Versus
MAHIDA AMARSANG MANSANG & 3 - Respondent(s)

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Appearance :
MR GC RAY for Petitioner(s) : 1,
MR JS BRAHMBHATT for Respondent(s) : 1 - 2.
RULE SERVED for Respondent(s) : 3 – 4.Ms. Trusha Patel, AGP for respondents No. 3 and 4.

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CORAM : HONOURABLE MR.JUSTICE K.M.THAKER

Date : 29/11/2007
ORAL JUDGMENT

The petitioner has preferred this petition under Article 227 of the Constitution of India challenging the order dated 26.12.1995 at Annexure

'A' passed by Deputy Collector in Case No. 85/94 and order dated 30.10.1996 passed in Revision Application preferred by present petitioner.

2. Mr. G.C. Ray, learned advocate appears for the petitioner and Mr. JS Brahmbhatt, learned advocate appears for respondents No. 1 and 2, and Ms. Patel, AGP for respondents No. 3 and 4.

3. It is the case of the petitioner that by a registered sale deed,the petitioner had purchased land bearing Survey No. 254/2 admeasuring 0 acre and 13 gunthas situate in the sim of Alarsa from respondent No.1.

3.1. The petitioner has stated that the respondent No.2, i.e., Shri Harisang Mansang Vaghela had made an application praying for a declaration that the aforesaid transaction may be declared void under the provisions of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 [“the Fragmentation Act” for short].

3.2 As per the petitioner's case, the Deputy Collector, Petlad heard the said application and passed the order dated 26.12.1995 [Annexure A to this petition]. The petitioner, upon being aggrieved by the said order dated 26.12.1995, preferred a revision application before the competent authority under Section 35 of the Fragmentation Act and in the said proceedings the competent authority, after hearing the parties, passed the order dated 30.10.1996/2.11.1996 whereby the competent authority dismissed the revision application and confirmed the order dated 26.12.1995.

4. In the backdrop of the aforesaid facts, the petitioner has challenged the orders dated 26.12.1995 and 30.10.96/2.11.96, Annexures A and B respectively.

5. Mr. Ray, learned advocate appearing for the petitioner submitted that the application preferred by present respondent No.2 ought to have been dismissed. The reason, which Shri Ray, Advocate urged in support of his said contention, is that according to the petitioner present respondent No.2

has nothing to do with the said transaction. He further submitted that mutation Entry was already made and therefore also the impugned orders ought not to have been passed. In counter, Mr. Brahmbhatt, Advocate vehemently tried to support the orders and contended that there was nothing wrong or illegal in the action of respondent No.3 since respondent No.3 believed that the transaction was contrary to law. He has not made any other submission. Ms. Patel, AGP could not effectively justify or support the orders.

6. On perusal of the impugned orders, it is noticed that the said two contentions raised by the petitioner in the present petition are considered by the concerned authorities. It has been recorded by both the authorities below that the transaction in question is contrary to the provisions of the said Act. In view of such concurrent findings and orders, normally this Court would not entertain a petition under Article 227 of the Constitution of India, however, the court may not be averse in exercising the jurisdiction if the orders, though concurrent, are patently and apparently perverse or contain

findings contrary to law laid down by the Court or where there is manifest injustice and there is need for substantial justice.

7. It is pertinent to note that from record it transpires that along with his brothers the petitioner is a co-owner of land bearing survey No. 609/5 which is adjoining the land in question. In other words the petitioner is a co-owner of contiguous land. The finding regarding breach of provisions of the Fragmentation Act is, therefore, required to be examined in light of the said vital fact.

8. The authorities below have proceeded on the premise that if the piece of land is sold to one of the co-owners but not to all of them jointly, i.e., if all the co-owners are not joint purchasers, then such a transaction with one of the co-owners would amount to violation of provisions under the Fragmentation Act.

9. Therefore, definition of the term “owner” in the Fragmentation Act is required to be considered.

The definition of the term “owner” is under Section 2(8) of the Fragmentation Act, which reads;

> “**2. Definitions.**__ In this Act, unless there is anything repugnant in the subject or context--
>
> (8) “Owner” means in the use of unalienated land the occupant or tenure-holder and when such land has been mortgaged owner means the mortgagor; in the case of alienated land owner means the superior holder or Girasadar;
>
> Explanation.__ In this clause the expression “Girasadar” shall have the meaning signed to it in the Saurashtra Land Reforms Act, 1951 [Sau.Act XXV of 1951].”

9.1. On perusal of the said definition, it is clear that it does not contemplate that there cannot be co-owners or that there cannot be joint ownership. The said definition, inter alia, provides that “owner” means the “occupant” or “tenure-holder”, in case of an unalienated land. In present case, so far

as the survey No. 609/5 is concerned, there does not appear to be any dispute as regards the fact that the said survey number is unalienated land.

9.2. At this stage, provisions under Section 8AA may also be taken into account. The relevant portion of said Section 8AA reads:-

> ***8AA. Restriction on partition of land.-***
>
> *(1) Where, by transfer, decree, succession or otherwise, two or more persons are entitled to shares in an undivided agricultural land in any local area for which standard areas have been fixed, and the land has to be partitioned among them, such partition shall be effected so as not to create a fragment.*
>
> *(2) Where such partition is made by the Court of the Collector, the following procedure shall be adopted___*
>
> *(a) to (e) .....*
>
> *(3) Where a partition is effected in execution of a decree all questions relating to the partition of the land and apportionment of compensation shall be decided by the Court executing the decree or by the Collector effecting the partition, as the case may be, in accordance with the*

provisions of sub-section (2).”

9.3. It is pertinent to note that from the record, it does not transpire that at the time of transaction or thereabout or before the orders in question came to be passed, there was partition of Survey No. 609/5 amongst the co-owners.

10. Hence, what follows is that the transaction in question has been entered into by one of the co-owners of adjoining property.

11. The authority, however, has proceeded on the premise that though the purchaser is one of the co-owners of adjoining property, the transaction would not be saved by the said fact.

12. The question which arises for consideration is as to whether such premise and conclusion of the authorities is correct and justified.

13. Upon examining the object and scheme of the Fragmentation Act or from the provisions of the Act and particularly from the definition of the term

“owner”, such a view, is not possible.

13.1. The Preamble of the Act provides:

> “WHEREAS it is expedient to prevent the fragmentation of agricultural holdings and to provide for the consolidation of agricultural holdings for the purpose of the better cultivation thereof.”

13.2. Thus, better, effective and profitable cultivation of agricultural lands, by preventing small or unviable fragments of agricultural land and by consolidating, wherever possible, the holdings of agricultural land, is the main object of the Act. Hence, while the Act prohibits (e.g. Section 8 and 9 of the Act) creation of fragment, by way of transfer or partition, it also allows transfer of fragment in favour of owner of contiguous survey number (e.g. Section 7 of the Act) so as to ensure consolidation.

13.3. The object of the Act is also highlighted and flows from Sec. 25, which makes provision for granting loan to owner of land to assist consolidation, and S. 8AA, which makes detailed

provision as to how partition is to be effected so that fragments can be avoided.

13.4. If under the scheme of the Act, co-ownership or joint-ownership was not contemplated, then the provision under Section 8-AA would not have been introduced.

14. Further, a contention regarding violation of principles of natural justice has also been raised on behalf of the petitioner on the basis of the allegations made in Ground (H) wherein the petitioner has averred as follows;

> *(H) The order under the proceedings of Sec. 6(1) of the Act is not binding to the petitioner because – he has not been heard though he was owner of the land, and therefore no reliance can be placed on the order passed under the said Section.*

14.1. It is, however, difficult to accept the said submission since the order recites that reply dated 5.12.1995 was submitted by the petitioner and from

the recital of the order it also transpires that the said reply was taken into consideration by the authority. In the order dated 26.12.95 the authority has recorded that necessary notices were issued to the parties, which is not disputed by the petitioner.

14.2. If even after the notice the petitioner does not avail the opportunity and prefer to submit reply, then subsequently he cannot be permitted to raise objection on the ground of violation of principles of natural justice.

15. The petitioner has, as noted above, also raised a contention that the respondent No.2 had nothing to do with the transaction and he was not concerned in the transaction in any manner.

15.1. The petitioner, in other words, contends that the respondent No.2 despite being a stranger and without any interest in the transaction or without being adversely affected by the transaction, made application to the competent authority and it was his said application which became the foundation for the

concerned authority to initiate the proceedings.

15.2. In reply, the advocate of respondent No.2 urged that respondent No.2 owns adjoining land and except owning adjoining land he does not have any interest in the transaction.

15.3. In backdrop of such facts, petitioner's contention does not appear to be wholly ill-founded. The petitioner's Advocate extended the contention and urged that the respondent No.3 acted at the behest of the vendor i.e., Shri Amarsang M. Mahida. However, no such allegation is expressly taken by the petitioner before the concerned authorities nor any express allegation or submission to that effect has been made in his petition also, but the averments made in Ground (B) by the petitioner contain an element of such a contention. The said ground (B) reads thus;

> *“(B). The application ought to have been dismissed because the applicant has nothing to do with the said deal*

> *and the applicant is totally stranger to the deal and therefore not competent to file an application."*

16. An issue, though not similar, but nearer to or akin to such contention, was considered by this Court [Coram: Hon'ble Mr. Justice S.B. Majmudar, as His Lordship then was] in the judgment in the case of ***Smt. Ratnaprabhabai D/O Hirojirao Naranrao Mane vs. M/s. Tulsidas V. Patel & Ors.,*** reported in ***1982 (2) G.L.R. Page 213,*** wherein it has been held that;

> *"The State which could have got these lands vested in it by any effective exercise of suo motu powers by the Mamlatdar under sec. 84C did not think it proper to challenge his order refusing to take such action. In these circumstances, it is difficult to appreciate how the petitioner-original vendor of the lands felt aggrieved by the decision of the Mamlatdar who had refused to set aside petitioner's sale transaction of 1962 in favour of respondent*

No.1.....It appears that the petitioner having pocketed Rs. 1,00,000/- years back in 1962 is trying to catch at a straw and is practically indulging in the policy of dog in the manger by seeing that the hanging sword of the present litigation lingers on so that at some time respondents Nos. 1 and 3 may come round and may give some added financial advantage to the petitioner by way of bargain and if the present proceedings are kept pending, such oblique intention of the petitioner may get fructified. The court obviously cannot be a party to such a design. When the petitioner is not a legally aggrieved party, it is impossible to give her any relief in the present proceedings under Article 227 of the Constitution by restoring these proceedings to the file of the Tribunal so that the transaction entered into by the petitioner in favour of respondent No.1 years back in 1962 may once again be brought in the melting pot."

17. It is true that, in the said case the issue

considered by this Court was in light of the fact that the controversy was initiated by the vendor. It is also true that, in present case it is not the vendor who subsequently initiated the controversy regarding the transaction but it is done by a person who is stranger to the transaction. In present case, the competent authority has not suo motu exercised the powers which could have been done in light of the provisions under the Act. This is the reason why the petitioner has voiced grievance against the role played by the respondent No.2.

17.1. The respondent No.2 might have acted at the instance of respondent No.1 or for his own interest. Be that as it may. However, the respondent No.4, while initiating and conducting the proceedings, ought to have taken into consideration this aspect of the matter also, particularly in view of the judgment of this Hon'ble Court in case of ***Smt. Ratnaprabhabai D/O Hirojirao Naranrao Mane*** *[supra].* The said aspects are required to be taken into account by the authority while deciding matters in like factual background.

17.2. Ms. Trusha Patel, learned AGP appearing for respondents No. 3 and 4 has relied upon the judgment of the Division Bench of this Court in the case of ***Valjibhai Jagjivanbhai vs. State of Gujarat,*** reported in ***2005(3) GLR Page 1852***. In the said judgment, it is held, while considering the provisions under Section 9, sub-section (2) and (3), that the Collector may upon coming to know about such transaction *from any source* [emphasis supplied] initiate the proceedings and resort to powers under sub-section (2) and (3) of Section 9. Relying on the said judgment she contended that it cannot be said that the respondent authorities were not justified and/or competent to act upon the information (application) by respondent No.2.

17.3. The respondent authorities certainly can act on the basis of information from any source. Actually for advancing the object of the Act, the authorities are duty bound to act, even suo motu also however care and caution are also expected, so as to guard against and to strike balance between mischief

or ill-intended acts of vendors and object of the Act.

18. In the impugned orders, the respondent authorities have noted the fact that Survey No. 609/5 is an adjoining piece of land and that the petitioner is a co-owner of the said land. The respondent authorities, however, after recording the said aspect, overlooked the definition of the term “owner” contained in Section 2(8).

19. It appears that, while passing the impugned orders the respondent authorities have lost sight of or have misconstrued the definition of the term “owner” under Section 2(8) of the Act. The respondent authorities also overlooked the legal position well settled by this Court with regard to holding of land by co-owners. In the judgment in the case between ***Rathod Nayamatkhan Ahmedkhan (Decd.) Through His Heirs & Lrs. v. M.K. Dass, Dy. Collector, Dabhoi & Ors.,*** reported in **1998(3) G.L.R. Page 2547**, this Court [Coram: Hon'ble Mr. Justice M.S. Shah) has held that;

"7. Section 7(1) of the Act provides that no person shall transfer any fragment in respect of which a notice has been given under sub-sec.(2) of Sec.6 except to the owner of a contiguous survey number of recognised sub-division of survey number. The question which arises is whether a co-owner will also be covered by this exception. At this stage, it is also required to be noted that by introducing Sec. 8AA the legislature did contemplate co-ownership of land and, therefore, provided that where two or more persons are entitled to share in an undivided agricultural land and the land has to be partitioned amongst them, no such partition shall be effected so as to create a fragment. However, the legislature did not deny the right to purchase a fragment, which is conferred on the owner of a contiguous survey number, to a co-owner of a contiguous survey number. Moreover, purchase of such a fragment by one or more co-owners of a contiguous survey number will be more conducive to achievement of the object of the Act to prevent

fragmentation and to achieve consolidation of holdings of agricultural lands. "

20. At this stage, it is required to be noted that the petitioner has submitted during the hearing of the present petition that a map showing the locations of the lands in question as well as other survey numbers was placed before the authority at the time of hearing which showed that the land of co-ownership is contiguous land qua the land in question. The said document is, however, not available on record of present petition.

21. Similarly, the factual position about co-ownership of Survey No. 609/5 is also not available on record. In other words, it is not possible to determine, at this stage and in present proceedings, as to whether around the time when the orders in question came to be passed or thereafter, there has been partition amongst the co-owners of S. No. 609/5 or not and/or whether the said Survey No. 609/5 is exactly adjoining the land in question, or not. All these aspects ought to have been properly considered by the authorities while passing the impugned order.

The said aspects cannot be examined in present proceedings and detailed inquiry into facts, by Competent Authority, will be necessary.

22. The impugned orders have been passed without taking into account or by misconstruing the provision contained under Section 2(8) and without having regard to the legal position settled by the judgment in the case of ***Rathod Nayamatkhan Ahmedkhan (Decd.) Through His Heirs & Lrs. v. M.K. Dass, Dy. Collector, Dabhoi & Ors.*** *[supra]* and the same have been passed on the premise that though the petitioner was a co-owner of a piece of land bearing Survey No. 609/5 (which is claimed to be an adjoining piece of land), a transaction with such a co-owner also would not be saved against the provisions contained under Fragmentation Act and the said transaction is contrary to the provisions under the said Act, and the authorities have, on such premise, invalidated the said transaction and have rejected the revision application of the present petitioner. Instead, the matter ought to have been considered by taking into account the definition of the term “owner” in Section

2(8) and its proper meaning and scope and the aforesaid judgment [1998 (3) GLR Page 2547] of this Court.

24. In light of the aforesaid discussion it becomes clear that the impugned orders are passed without duly considering the provisions under Section 2(8) and the settled legal position and that therefore they are not tenable. However a detailed inquiry into the facts will be necessary, which cannot be undertaken in this proceeding.

25. In the result, the impugned orders dated 26.12.1995 and 30.10.1996, for the aforesaid reasons and purpose, deserve to be set aside and are accordingly set aside. Though almost 10 years are consumed in this litigation, there is no option but to remand the matter for fresh inquiry and decision in accordance with the object, provisions and scheme of the Act and legal position settled by this Court. The case, therefore, is remanded to the respondent No.4 to decide it afresh. The respondent No.4 shall hear and decide the case afresh, but after

conducting such inquiry as may be considered necessary after taking into account the aspects discussed hereinabove and after affording opportunity of hearing to the petitioner, and if considered necessary to the respondents No. 1 and 2 also. The petition is, accordingly, partly allowed. Rule is made absolute to the aforesaid extent. No order as to costs.

[K.M. Thaker, J.]

rmr.